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Judge Blocks DOL's New Persuader Rule

The United States Department of Labor (DOL) recently announced changes to its regulations governing "persuader" activities, which include assistance and counsel to employers to avoid union organizing or responding to a union organizing campaign. According to DOL's new rules, any agreements entered into after July 1, 2016, for an attorney or consultant to provide services relating to union activity **must be reported to DOL and publicly disclosed.** Examples of the services which would be covered include supervisor training, drafting of sample employee communications, providing labor advice, assisting in response to an organizing campaign and drafting campaign materials.

We believe that these new regulations significantly interfere with our clients' right to seek legal advice on important matters of labor relations. Accordingly, our firm and several others filed a lawsuit against the United States Department of Labor, in which we have asked the court to prevent DOL from implementing these new rules. The judge in our case indicated that he believes we are correct and will ultimately prevail. In a different case brought by the national homebuilders association, another judge indicated that he also believes that the new rule is fatally flawed and ordered that DOL cannot enforce the rule while he considers his final decision.

According to DOL's current position (which may change), the new reporting rules will not apply to services provided pursuant to an agreement entered into **prior to July 1st** and these services can therefore remain confidential. Although we are confident in our position in these lawsuits, we nevertheless recommend that you memorialize your existing agreements with labor counsel to protect your confidentiality when you seek legal advice on these important labor relations matters.

Is HR Protected from FLSA Retaliation?

The Fair Labor Standards Act is one of the few employment laws where there is a risk of personal liability to managers whose actions result in a violation. In the case of *Miller v. Metrocare, Services,* U.S., No. 15-1252 (June 13, 2016), the Supreme Court declined to review a case holding that the human resources manager was not protected from retaliation for expressing his concerns about FLSA compliance. Miller was the HR Manager for Metrocare, which was a not-for-profit health services provider. According to Miller, Metrocare misclassified caseworkers as exempt under the FLSA and expressed this to the Chief Executive Officer. Shortly after expressing this concern, Miller was terminated. Miller claimed it was in retaliation for expressing concerns about an FLSA violation; Metrocare argued that Miller was terminated for his failure to conduct criminal background checks.

Metrocare argued that Miller failed to prove his case and, furthermore, was excluded from protection of retaliation because his disclosure to the company was in the "manager role" an exception to retaliation. The "manager role" means that if an individual's job responsibilities include reporting a violation of the FLSA, the individual cannot claim retaliation in response for doing so. The First, Fifth, Sixth, and Tenth U.S. Circuit Court of Appeals agree with that position. That is, doing what the job requires (reporting a possible violation) does not protect the individual from termination for doing so. The Ninth Circuit has taken a contrary position holding that it doesn't make sense to say that because an HR Manager did his job by reporting a possible violation that he therefore could not claim retaliation for doing so.

The effect of the Supreme Court's decision denying review of this case means that for the majority of our country, an HR Manager who reports a violation of the Fair Labor Standards Act may not be protected from retaliation for doing so.

Trying to Avoid One Claim Leads to Another

Apparently, trucking firm capital New Prime, Inc. did not trust enough of its male trainers to assign them to train newly hired female drivers. Thus, to prevent a sexual harassment claim, the company required that female trainers would train female drivers. Although New Prime avoided the sexual harassment claim, it ended up paying $3 million dollars for sex discrimination due to its training practices. *EEOC v. New Prime, Inc.* (W.D. Mo. May 26, 2016). New Prime's training policy arose out of a sexual harassment lawsuit brought by the EEOC ten years earlier, in which a male trainer was found to have sexually harassed a female trainee. The basis for the current lawsuit was that there were not enough women trainers to train the newly hired women drivers, therefore, those drivers went longer periods of time without pay compared to male drivers who apparently could be trained by anyone without the fear of a sexual harassment issue developing.

The company agreed to a Consent Decree with a payment of $2.8 million dollars to sixty-three women who were adversely affected by the same sex trainer policy. This policy was a variation of the prohibition on considering gender as a basis for job assignments. There are limited exceptions where gender relates to the essence the employer's business. In the case of New Prime, assigning women only to train based upon the stereotyped behavior of male trucker trainers was a violation of Title VII. And employers' efforts to prevent a form of harassment or discrimination may not include creating another form of discrimination as a remedy.

Court Upholds NLRB "Message Clothing" Restriction

An employee's freedom of expression in the private sector workplace has limits, but apparently not so much when it involves union pins or insignias. In the case of *Boch Imports v. NLRB* (1st Cir. June 17, 2016), the U.S. Court of Appeals for the First Circuit upheld the NLRB decision that an employer's message clothing restriction interfered with an employee's statutory rights.

The NLRB attempts to achieve a balance between an employee's rights of expression under the National Labor Relations Act and the employers concerns that such expression would interfere with its business operations. In this case, the employer prohibited employees from wearing "pins, insignia, and message clothing." As luck would have it, the message clothing involved pro-union expressions.

Boch, a car dealership, banned message clothing worn by employees who repaired the vehicles and employees who worked on the sales floor and did not wear uniforms. Boch articulated a legitimate business concern banning the pins from those who repaired the vehicles and wore uniforms—Boch was concerned that the uniform could scratch or otherwise damage the interior of the vehicle. However, Boch did not articulate the unreasonable interference caused by other employees whose jobs did not require them to work inside a vehicle. Generally, under the National Labor Relations Act a dress code ban is likely to be invalidated if created in response to union activity or enforced in a discriminatory manner. Boch's rule was in place prior to the union activity, but it's failure to articulate the reason for enforcing the rule to those who do not come into contact with the inside of a vehicle, resulted in the conclusion that it's rule was invalid.

Will Annual Raises Disappear?

According to a recent analysis by Bloomberg, General Electric, during the next several months, will consider eliminating the annual raise and performance appraisal process. According to Bloomberg, GE representatives stated that these changes involve "being flexible and rethinking how we define rewards, acknowledging that employees and managers are already thinking beyond annual compensation in this space." To a certain degree, this change is in conjunction with perks that appeal to employees of different generations. The thought is that employees would rather see "spot increases" or rewards and an expansion of perks that have a greater impact on their lifestyle. For example, do employees who approach retirement age value time off more than an annual increase (we know, they want both)? Do employees under age forty place a greater value also on some form of guaranteed leave? According to Bloomberg, 44% of U.S. employees qualify for statutory or employer provided leave.

An additional concern about the annual raise is that it is not frequent enough to retain talent. According to a source quoted by Bloomberg, "an annual raise is 'more like employees are serving tours of duty and you need to get them to reenlist and get them re-engaged.'" Simply stated, individuals do not want to wait a year to learn whether they will receive a raise. The Bloomberg article noted that the annual raise began in earnest during the 1960's, when inflation was low, prices were stagnant, and the way employees obtained raises was to switch jobs.

Congress Continues Attempting to Chip Away at the ACA

The Republicans in the United States House of Representatives released a proposal on June 22, 2016 that is being referred to as a "blueprint" for reforming the health care system. The brief, titled "A Better Way – Our Vision for a Confident America" (http://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf), seeks to minimize the federal government's role, set a few broadly shared goals, and give state governments more input in determining how to implement those goals in their own markets. The following summarizes the elements included in the proposal:

- Improves the flexibility of health savings accounts (HSAs), including allowing spouses to make catch-up contributions to the same HSA account;
- Supports the purchase of portable health insurance that would allow every American to access financial support for an insurance plan they can take with them from job to job, or to home to start a business or even into retirement;
- Allows small business and voluntary organizations to band together to offer small business health plans;
- Promotes medical liability reform;

- Encourages the use of health reimbursement accounts by employers to reimburse employees' premium costs for individual coverage;

- Eliminates the EEOC's new regulations on workplace wellness programs (Link to ELB from last month);

- Eliminates the Cadillac Tax;

- Eliminates the "employer mandate," while maintaining many of the Affordable Care Act's insurance reforms such as banning pre-existing conditions, clauses, ending lifetime limits on coverage to individuals, limiting the cost of an older individual's plan.

Elimination of the employer mandate would necessarily do away with many of the complicated administrative burdens that the ACA has placed on employers, including the IRS reporting process. It is not surprising that business groups have reacted favorably to the elimination of the employer mandate and reporting burdens; however, there is one key portion of the plan about which they are not pleased – limitation of the tax exclusion on employee premiums under employer provided health care. The GOP proposal would subject employer paid health insurance to payroll and income taxes once the value exceeds a cap that has not yet been determined.

Other alternative bills to the ACA have also been previously introduced, including the "Patient Choice, Affordability, Responsibility and Empowerment Act," first introduced in 2014 by Sen. Orrin Hatch and Rep. Fred Upton, as well as the "World's Greatest Healthcare Plan Act," introduced in May 2016 by Rep. Pete Sessions and Sen. Bill Cassidy.

Although the future of these proposals remains unclear, one thing is certain – it is unlikely that any significant changes will occur until after the elections in November.

The House has also been busy working on other health care related bills, with its Ways & Means Committee passing seven of them on June 15, 2016. Two of the seven bills passed the full House of Representatives on June 21, 2016 – the "Small Business Health Care Relief Act" (H.R. 5447) and the "Native Americans Savings Improvement Act" (H.R. 5452). The first bill would create a safe-harbor for innovative employer payment arrangements, by allowing small businesses (with less than 50 employees) to give pre-tax dollars through a health reimbursement arrangement (HRA) to help employees purchase health plans on the individual marketplace. Pursuant to certain qualifications, the bill also allows an HRA to be used to pay for qualified health expenses on a pre-tax basis. The "Native American Savings Improvement Plan" would allow individuals who are eligible for Indian Health Service assistance to qualify for health savings accounts.

Both of these bills are now in the Senate for consideration.

REMINDER:
Deadline to electronically file
ACA reporting forms is
Thursday, June 30, 2016!

Applicable large employers and other providers of minimum essential coverage still battling the burdensome IRS reporting forms have just a few more days to file these returns if filing them electronically. The IRS recently posted a webinar on the IRS Video Portal to provide guidance on these deadlines, as well as how to make corrections, and what the penalties may be for failing to file. The webinar may be accessed here: http://www.irsvideos.gov/Governments/AffordableCareAct/AffordableCareActInformationReturnsCorrectionsProcess

Employers required to comply with the ACA reporting requirements should be reminded that the IRS will not impose penalties on reporting entities that can show they made good faith efforts to comply with the information reporting requirements; however, the relief applies only to the filing of incorrect or incomplete information and does NOT apply to failure to file on time. ALE's should also note that if a taxpayer's electronic transition of ACA information returns is rejected by the IRS, the transmission must be completely replaced rather than corrected.

NLRB Tips: NLRB News

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

Seventh Circuit Court of Appeals Disagrees with the Fifth Circuit on Mandatory Arbitration Waivers – Split Established in the U. S. Courts

As noted in the May 2016 ELB, the NLRB has been unsuccessful, almost universally, in getting support for its position invalidating mandatory arbitration waivers. That has now changed, as the Seventh Circuit Court has sided with the NLRB, enforcing the Board's position in the courts.

In *Lewis* v. *Epic System Corporation,* No. 15-2997 (7th Cir. 5/26/16), the Court, normally considered a business friendly appeals court, took the Company to task for requiring employees to sign an agreement that provided that wage claims must be brought as individual arbitrations.

Affirming the lower court, the Seventh Circuit affirmed the NLRB decision in *D. R. Horton,* 357 NLRB No. 184 (2012), in which the Board found that class and collective action waivers in an employer's mandatory arbitration policy interferes with employee rights under Section 7 of the Act. The court distinguished between "procedural" rights v. "substantive" rights under the National Labor Relations Act (NLRA).

The court decided that the ability to pursue class collective, or representative legal remedies was a substantive right guaranteed by the NLRA under Section 7 of the Act, Section 7 of the Act gives employees the right to engage in protected, concerted, activity.

In essence, the Seventh Circuit bought the argument made by the NLRB in seeking *en banc* review of the Fifth Circuit adverse decision in *Murphy Oil USA, Inc. v. NLRB* 5th Cir., No. 14-60800, *petition for rehearing* 4/18/16. As stated in the May 2016 ELB, the Fifth Circuit ultimately rejected the Board's argument that the Fifth Circuit court "wrongfully assumes" that the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA) are in conflict

What is Next?

With the *Lewis* decision, the Seventh Circuit has become the first federal circuit court to agree with the NLRB's position in *D. R. Horton.* The Fifth Circuit has directly reversed the *Horton* decision, and the Second and Eighth Circuit Court of Appeals has rejected the Board's logic. Given the circuit court split, it appears likely that the U. S. Supreme Court will weigh in on the legality of class and collective waiver under mandatory arbitration agreements.

Hopefully, the Supreme Court will be at full membership before it decides the case, in order to avoid a possible 4-4 vote.

The Fifth Circuit Court of Appeals Joins the Fourth, Sixth and Eighth Circuits in Approving *Specialty Healthcare*

In what appears to be the final nail in the proverbial coffin for employers, the Fifth Circuit Appeals court joined other circuit courts in approving micro-units under the NLRB's *Specialty Healthcare* decision. Do not look for the law to change in the near future, unless there is a political solution after the fall general election.

The Fifth Circuit, on June 2, 2016, affirmed a district court decision holding that the NLRB did not misapply a legal standard when it certified a bargaining unit consisting of all cosmetics and fragrances employees at a Macy's department store. In its opinion, the Court rejected Macy's arguments in their entirety. The Court found, among other things:

> Contrary to Macy's claim that all employees 'collaborate in the same integrated workplace,' the board found 'little evidence of temporary interchange between the petitioned-for employees and other selling employees'.

In its opinion, the Circuit Court said that the "overwhelming community of interest" standard

articulated by the NLRB in *Specialty Healthcare* did not violate the NLRA, the Board did not depart from a uniform rule by applying the new standard in this case, and that the Board did not import its *Specialty Healthcare* standard from another case in a different context.

Additionally, the Court found that:

- The "overwhelming community of interest" test was not adopted in violation of the Administrative Procedures Act.

- The Board did not "abuse its discretion" when it determined that the other selling employees at the store did not share an "overwhelming community of interest" with the petitioned-for employees.

Therefore, the Fifth Circuit granted the NLRB's cross-application for enforcement and denied Macy's petition for review. It now appears that the micro-unit standard as articulated by the NLRB is now settled and that the smaller units will be found appropriate when the petitioned-for employees have a community of interest separate and apart from their coworkers. Apparently, interchange and contact among proposed unit employees still matter to the courts.

GC Wants Law Changed on Withdrawal of Recognition

In what has become routine for an activist NLRB, General Counsel (GC) Richard Griffin has identified an area of the law that has been settled for a substantial period of time and now wants to change it. For many years, an employer has had the right to unilaterally withdraw recognition from a union when there is objective evidence that a majority of the employees in a bargaining unit no longer want the union to represent them. The words used by the Board which set forth the evidentiary standard in *Levitz Furniture*, 333 NLRB 717(2001), are "clearly indicated" that a union has "lost majority support."

The GC wants to change the law to preclude an employer from withdrawing recognition, no matter how strong the evidence that employees no longer wish representation. Under the GC's new rule, if adopted by the Board, the only way to withdraw recognition will be unless and until the bargaining unit employees or the employer petition for a decertification election and a majority of the employees vote against continued representation in a legally valid election.

The GC's proposed policy is set forth in GC memorandum 16-03, where he urges the regional offices to issue an unfair labor practice complaint any time an employer withdraws recognition from a union based upon the existing law that employees no longer wish to be represented by a union.

The Bottom Line

If the GC position is adopted, then employers will have to continue to recognize the union and bargain with it for a new contract even where it knows that a majority of the employees (based upon an "objective, good faith belief") do not want the union to continue to represent them. Expect this rule change to occur, as the GC and the Board are operating in virtual lockstep together.

OSHA Tips: OSHA Answers to Questions

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

A very useful tool in understanding OSHA's expectations for compliance with its standards may be found in the agency's published answers to questions it receives. The following includes examples of such responses.

One such question pertained to the marking of aisles in industrial facilities. The reply indicated that the aisles may be any color as long as they clearly define the area considered as aisle space. They may be any composition of dots, squares, stripes, etc. as long as they define the aisle area. The recommended width is at least three feet wider than the widest equipment or a minimum of four feet.

Another question was whether the respiratory protection standard requires separate fit test for each harness. OSHA answers that each respiratory model needs a separate fit test.

One employer asked whether the electrical requirements of 29 CFR 1910.303(g)(2yi) apply to voltages below 60 volts DC. OSHA answers in the affirmative and notes that the requirement does not distinguish AC and DC voltages.

OSHA answers questions pertaining to contaminated laundry as follows: contaminated laundry is defined as laundry that has been soiled with blood or other potentially infectious materials or containing sharps. It is noted that employees are not permitted to take protective equipment home and launder it. It is the responsibility of the employer to provide, launder, clean, repair, replace, and dispose of personal protective equipment.

In one case, OSHA was asked to define what is meant by "medical evaluation" and specifically does a medical evaluation always include a physical examination. The answer given indicates that it may be examination or with a questionnaire and follow up with medical exam for any issues indicated.

OSHA answers a number of questions as follows: What do I do if my worker is using drugs or alcohol on the job and I think they will cause an accident? In this case the employer may wish to contact the Department of Health and Human Services Substance Abuse and Mental Health Service Division of Workplace Programs @workplacesamhsa.gov for more information for setting up a substance abuse program.

OSHA does not have a standard at present for workplace substance abuse. However, citations might possibly result under the general duty clause of the OSHA Act given the right circumstances.

Wage and Hour Tips: Current Wage and Hour Issues

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

Recently, Wage and Hour conducted a webinar where they discussed the new regulations and their applicability beginning December 1, 2016. After the webinar participants were allowed to submit questions. A few days later they placed their responses on their website. Below is a sample of those questions and Wage Hour's response. Due to the number of questions that were received I have included only a sample of their response. The entire list is available on their website.

New Overtime Rule

Webinar

Questions & Answers: May 26, 2016

UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

This presentation, including the Question and Answer portion presented in this email, is intended as general information only and does not carry the force of legal opinion. The Department of Labor (DOL) is providing this information as a public service. This information and related materials are presented to give the public access to information on DOL programs. The Federal Register and the Code of Federal Regulations remain the official source for regulatory information published by the DOL.

Q. I want to get clarification on HCE. With the new range being $134,000.00, does that mean that anyone we have earning between $100,000 but less than $134,000 that they have to be brought up to $134,000? Or does that mean that anyone earning over $100,000 but under $134,000 is no longer considered a HCE. I am just not clear on if they need to be bumped up or can be left alone.

A. If your employee earns at least $913 per week and passes the standard duties test they will not be affected by the increase in the HCE total annual compensation threshold. If they only pass the relaxed HCE duties test,

you would need to raise their compensation to the new threshold ($134,004 per year) to retain their exempt status. Alternatively, you could reclassify the employee as non-exempt, which means that they would be entitled to receive overtime pay for all work hours beyond 40 in a workweek.

Q. With regard to the non-discretionary bonus and catch up payment provisions, does “quarterly” mean calendar quarter, fiscal quarter, or is it up to the employer’s discretion?

A. No, it does not mean the calendar quarter. It is the employer's discretion when the quarter will begin.

Q. Is the Computer Professional minimum salary/minimum hourly wage requirement increasing as part of the Final Rule?

A. The hourly salary for the Computer Professional Exemption is still $27.63. However, the weekly standard salary amount has increased to at least $913 per week.

Q. Can an employer say that a Christmas bonus is part of their salary in effort to meet the new standard?

A. When the Final Rule takes effect on December 1, 2016; employers will newly be allowed to satisfy up to 10 percent of the standard salary level with nondiscretionary bonuses and incentive payments (including commissions). Nondiscretionary bonuses and incentive payments are forms of compensation promised to employees, for example, to induce them to work more efficiently or to remain with the company. By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards. An unannounced holiday bonus would qualify as a discretionary bonus, because the bonus is entirely at the discretion of the employer, and therefore could not satisfy any portion of the $913 standard salary level.

Q. Multiple Incumbent Positions: If I have a job, which meets an exemption test, am I able to reclassify only those who are below the new minimum to non-exempt and allow those that are over to remain exempt? Or, does the entire classification need to be exempt or non-exempt?

A: The "white collar" exemptions require an employee to be paid on a salary basis, paid above a certain salary level, and meet the respective duties test. If an employee meets the duties test of an executive, administrative, or professional employee, and meets the salary basis requirement, and meets or exceeds the salary level requirement, they would meet the requirements for the exemption. If they fail to meet any part of the criteria, they would not meet the exemption and would therefore be non-exempt. The exemption is applied on an employee by employee basis, not to a particular classification. Keep in mind the salary level and salary basis requirements do not apply to outside sales employees, licensed or certified doctors, lawyers and teachers. Employees in these occupations who meet the duties test are exempt regardless of their salary.

Q. OT rules for non-profit organizations: A client has asked "Can overtime compensation be paid with time off (comp-time) calculated at time and a half?"

A. No. Only employers that are public agencies under the FLSA (e.g. a state government) can provide comp time in lieu of overtime premium payments.

Q. Are employers in compliance if they follow the annualized amounts? (Or do they have to make sure they are always in compliance each week?)

A. An employee's exempt status - and, if nonexempt, the employee's right to overtime pay - is determined on a weekly basis. Generally, to retain exempt status, an employee must satisfy the duties test and earn at least $913 per week.

Q. Quarterly bonus: if an employee is paid between $822 and $913 per week, can the bonus be paid less frequently than quarterly?

A. No. To count toward the standard salary level, nondiscretionary bonuses must be paid quarterly or more frequently.

Q. Did I understand you correctly to say that teachers do not have to earn the minimum exempt salary? In other words: there is no problem if the salary for teachers in a given geographic area is below the $913/week even if they're considered exempt employees.

A. Yes. Certain professional employees - including doctors, lawyers, and teachers - are not subject to the salary basis and salary level requirements that generally apply to other white-collar employees. To qualify for the professional exemption as a teacher, the employee must be employed in an "educational establishment" and have a primary duty of teaching.

Q. Non-Enforcement for Medicaid-funded services for individuals with intellectual and developmental disabilities in residential homes and facilities with 15 or fewer beds: Does the limited non-enforcement for Medicaid-funded services for individuals with intellectual and developmental disabilities in residential homes and facilities with 15 or fewer beds apply to companies that have multiple facilities all of which have fewer than 15 beds? Thank you.

A. The limited Non-Enforcement Policy for Medicaid-funded services for individuals with intellectual and developmental disabilities in residential homes and facilities with 15 or fewer beds - applies per establishment - not enterprise wide.

Q. In a public accounting firm, will the accountants who earn less than $47,476 be eligible for overtime? For example, a new college graduate passes the CPA exam and is a professional but the earnings are less than $47,476.

A. Once the Overtime final rule becomes effective December 1, 2016, white collar employees, such as CPAs, who are paid less than the minimum salary amount of $913 per week will not meet the professional employee exemption from overtime pay. Thus, such employees must be paid overtime for hours worked over 40 in a workweek.

Q. Do you plan to provide written guidance with further details regarding the application of the 10% "credit"?

A. Yes, we plan to issue additional guidance before the Final Rule becomes effective on December 1, 2016.

Q. Can we classify someone as Salary Non-Exempt and pay them less than the required amount but pay them overtime?

A. Yes, an employer is permitted to pay a non-exempt employee on salary basis which is less than the required $913 per week (New Overtime Final Rule) as long as the employee is not paid less than the federal minimum wage rate for all hours worked and is paid overtime for all hours worked in excess 40 per week.

Q. Any changes in the salary requirements for non-exempt workers?

A. Under the Fair Labor Standards Act, employees who are not exempt from its wage provisions must be paid not less than the federal minimum and overtime pay at not less than time and one half of the employee's regular rate of pay for hours worked over 40 in a workweek. For example, non-exempt employees may be paid on an hourly or salary basis.

Q. Is it permissible for newly non-exempt employees to be classified as salary non-exempt? All other non-exempt employees are hourly; salary non-exempt would be a new classification for us. It would be far less insulting for my accountants and those in similar positions be paid this way (even if we have to count hours) than to have to punch a clock.

A. Yes. Salaried status and exempt status are separate concepts, so employees entitled to overtime pay may still be paid on a salary basis (as long as they receive overtime pay for their work hours beyond 40 in a workweek). See Fact Sheet 23 for guidance on how to comply with the overtime requirement for salaried nonexempt employees: https://www.dol.gov/whd/regs/compliance/whdfs23.pdf.

Q. I have an employee that works 50 hours a week on exempt status. He will be moved back to hourly, and will get a pay reduction. This will help us to maintain his current weekly wage. Is this something that we can do and be in compliance with FLSA?

A. Employers have a range of options for responding to the updated standard salary level. For each affected employee newly entitled to overtime pay, employers may:

- increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;
- pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;
- reduce or eliminate overtime hours;
- reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or
- use some combination of these responses.

The circumstances of each affected employee will likely impact how employers respond to this Final Rule.

Q. You said nothing is changed in terms of paying employees on a Fee Basis. Do employees paid on a Fee Basis have to meet the criteria of one of the exemptions: executive, administrative, or executive? And, when the final rule is in place, will the fee basis pay have to equal $913 per week, rather than the current $455 per week threshold? Thank you.

A. For an employer to claim an exemption under the white collar exemption regulations (effective Dec. 1, 2016), the employee must meet the duties test under the executive, administrative, or professional exemption, and be paid not less than the minimum salary amount of $913 per week. Employees who meet the duties test under the administrative or professional exemption may also be paid on a fee basis of not less than $913 per week when the final rule becomes effective.

Q. If someone is paid a salary to work Monday through Friday and only works 4 days instead of 5, is the new rule stating we have to still pay the full salary for the week?

A. Yes, employees who perform any work in a workweek must satisfy the full standard salary level test to retain their exempt status. This is not a change from the current regulations. For information on permissible deductions, see 29 CFR 541.602.

Q. We have salaried professionals whom are not scheduled at any time to work more than 40 hours per week. Do we have to track hours each week to verify that or if the schedule doesn't allow for more hours can we document their schedules and not have them do a time card? We have several of the Officers that are very upset in having to go back to turning in time cards each week.

A. If the salaried professionals are bona fide exempt employees as defined in 29 CFR Part 541.300, there is not a recordkeeping requirement. However, if the salaried professionals do not meet all the requirements for the exemption, including the salary level, there are recordkeeping requirements that can be found in 29 CFR Part 516, which would be applicable to them. Furthermore, overtime-eligible workers are not required to punch a time clock. Employers have options for accounting for workers' hours - some of which are very low cost and burden. There is no particular form or order of records required and employers may choose how to record hours worked for overtime-eligible employees. For example, where an employee works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and then indicate the changes to the schedule that the worker actually worked when the worker's hours vary from the schedule ("exceptions reporting"). See Fact Sheet 21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA).

Q. Final salary number for exempt: How was the decision made to come up with the 47 plus verses the 50 plus number?

A. The Department received a large number of comments expressing concern that the proposal didn't take into account low-wage regions, low-wage industries, and small businesses. In response to these concerns, the Department set the level at the 40th percentile of full-time salaried workers in the lowest wage Census region instead of the 40th percentile nationally, as proposed in

the Notice of Proposed Rulemaking. This resulted in the new salary level of $913/week ($47,476 annually).

If you have additional questions or would like to discuss problems that you anticipate with dealing with the increased salary requirements please give me a call.

2016 Upcoming Events

2016 Employee Relations Summit

Date:	November 17, 2016
Time:	8:30 a.m.–4:00 p.m.
Location:	WorkPlay Birmingham, AL
Registration Fee:	Complimentary
Registration Cutoff Date:	November 11, 2016

To register, click here.

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Ashley Marler at 205.323.9270 or amarler@lehrmiddlebrooks.com.

Did You Know . . . ?

. . . that according to a Harris Poll, 40% of those who are unemployed have stopped looking for work? According to the poll, 51% of the unemployed stated they've gone more than a year without a job interview and 40% have not had work for over two years. Interestingly, half of those unemployed who were surveyed blame themselves for their current situation, while only 30% say their situation was due to the economy. The amount of time spent looking for work declined from an average of 13.8 hours during 2014 to the current 11.7 hours per week.

. . . that legislation has been introduced in California to prohibit asking applicants about their salary history? The California Assembly passed this bill by a 47-29 vote. A similar bill was vetoed in 2015. The bill would also require private employers to disclose pay scale to employees if requested. The bill's sponsors state that the purpose of the bill is to address income and equality based upon gender. That is, if statistically women are paid less than men, then a female applicant who discloses her salary history will be hired at a salary that perpetuates that pay equality. Similarly, disclosing pay structure information to employees upon request places each employee in an informal enforcement position if they believe that they are paid less due to gender or any other protected class.

. . . an undocumented worker may claim retaliation for filing a workers' comp claim? *Sanchez v. Dahlke Trailers Sales, Inc.* (Minn. Ct. App. June 6, 2016). The court ruled that undocumented workers may bring a workers' compensation retaliation claim. According to the court, the illegality of employing undocumented workers is intended to address the hiring phase of the employment process. Because of the emphasis of not hiring an undocumented employee, the court stated that an employer may not be permitted to benefit from using the undocumented status as a way to defend against a retaliatory discharge claim. The court stated that to rule otherwise would not "discourage the employer from hiring undocumented workers at the outset."

. . . that FedEx Ground delivered $240 million in back pay due to driver misclassification? *In re FedEx Ground Package System, Inc.* (N.D. Ind. June 15, 2016). The case involved approximately 12,000 drivers who were misclassified as independent contractors. The evidence showed that FedEx Ground retained tight control over how the drivers performed their duties, their appearance, and their work hours. They simply were under the direction and control by FedEx Ground and, therefore, did not qualify as independent contractors. Although the financial benefits of an independent contractor relationship may be attractive to an employer, be sure that the independent contractor is in economic reality a stand-alone business where the manner and method of how the independent contractor performs the assigned responsibility is determined by the independent contractor, not the employer.

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